IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 1305 of 1986

For Approval and Signature:

Hon'ble MR.JUSTICE H.H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

DARJI AMARSHI LALJI

Versus

SHAH JETHALALA PRABHUDAS

Appearance:

MR SURESH M SHAH for Revision -Petitioner

MR AC GANDHI for Revision -Respondent

CORAM : MR.JUSTICE H.H.MEHTA

Date of decision: 26/07/2000

ORAL JUDGEMENT

This is a Civil Revision Application filed under Section 29(2) of the Bombay Rents Hotel and Lodging House Rates Control Act, 1947 (in short " the Act") by the original defendant no.2 Darji Amarsinh Lalji in Regular Civil Suit No. 245 of 1979 which was pending on the file of Joint Civil Judge (J.D.), Dholaji. He has challenged

the correctness, legality, propriety and regularity of the judgment Ex.13 rendered by Assistant Judge, Rajkot (who will be referred to hereinafter as " the learned Judge) in Regular Civil Appeal No. 129 of 1983, whereby the appeal preferred by original defendant no.2 was dismissed meaning thereby decree passed by the learned Judge of the trial court in Regular Civil Suit No. 245 of 1979 qua defendant no.2 was confirmed. It may be noted that the learned Judge of the trial court had also passed a decree for eviction of suit premises against defendant no.1 Darji Dhanji Shamji but he has not preferred any appeal against the decree passed against him.

Here in this Civil Revision Application, the revision petition is the original defendant no.2 who was as alleged by the plaintiff, a trespasser, inducted as sub-tenant by the defendant no.1. The revision -opponent is the plaintiff-landlord. For the sake of convenience, the parties will be referred to hereinafter as the respective defendants and plaintiff, in the suit.

2. The facts leading to this present Civil Revision Application in a nutshell are as under:-

Plaintiff is an owner of the suit property situated in Galalsha-na-Dela in Dhoraji town. That suit property is described with particulars in Para 1 of the plaint. As per the case of the plaintiff, defendant no.1 Darji Dhanji Shamji, by executing rent note dated 28th December, 1965 in favour of the plaintiff took that suit property on lease for monthly rent at the rate of Rs.30/-. As per that rent note executed by defendant no.1, he assured the plaintiff that he would not hand over the possession of the suit property to any other third person without written permission of the plaintiff. Inspite of such undertaking given by him in the rent note, defendant has unlawfully sublet the suit property to defendant no.2 and thus the defendant no. 1 has committed the breach of the terms and conditions of the rent note.

It is also the case of the plaintiff that defendant no.1 has become a tenant-in-arrears of rent for more than six months and further that defendant has neglected to make the payment of such rent due. It is a specific case of the plaintiff that plaintiff has never given suit property on lease to defendant no.2 and that defendant no.2 is not a tenant of plaintiff. It is further the case of the plaintiff that defendant no.2 is making demands of some consideration from plaintiff to

vacate the suit premises and accordingly, the defendant no.2 wrote a letter to plaintiff on 12th February, 1979. As the defendant no.1 has sublet the suit property to defendant no.2 and defendant no.1 has become the tenant in arrears of rent for more than six months, the plaintiff by addressing suit notice Ex.27 terminated the tenancy of the defendant no.1, and after service of that notice, the plaintiff filed Regular Civil Suit No. 245 of 1979 in the court of the learned Judge of the trial court on 4th December, 1979 mainly for a decree for eviction of the suit property executable against both the defendants and also for a money decree to recover Rs.330/- from the defendant no.1. He also prayed for a decree to recover Rs.50/- being notice charges, and costs of the suit.

Though the summons of the court was served upon the defendant no.1, the defendant no.1 thought it fit not to appear before the court, and therefore, the suit was proceeded exparte against the defendant no.1.

3. The defendant no.2 appeared before the trial court and resisted the suit by filing a written statement Ex.40, wherein the defendant no.2 has denied practically all the pleadings of the plaintiff pleaded in the plaint. It is the case of the defendant no.2 that the suit property was taken on lease by him and the defendant no.1 was never a tenant in the suit property. It is further the case of the defendant no.2 that as a middle man, the defendant no.1 recommended the plaintiff to let the suit property on lease to the defendant no.2. Thus, the defendant no. 1 has never transferred or assigned the suit property to the defendant no.2. It is further the case of the defendant no.2 that defendant no.2 has never refused to pay the rent. He was paying the rent but the plaintiff was not issuing the receipts, and the plaintiff has come out with a false case by alleging that the rent is due to him. The defendant no.2 has made a payment of rent for the period upto 31st December, 1979. In short, the defendant no.2 has denied practically the entire case of the plaintiff which he pleaded in the plaint.

4. From the pleadings of both the parties, necessary issues were framed at Ex.15. Keeping in mind the issues, framed at Ex.15, both the parties led their oral as well as documentary evidence in the suit before the trial court. After hearing the arguments of the learned advocates of both the parties, and after appreciating the evidence led by both the parties, the learned Judge of the trial court was pleased to come to a conclusion that the plaintiff has failed to prove that the defendant no.1

was a tenant of the plaintiff for suit property, and therefore, he also answered the Issue No.2 to the effect that in view of answer given for Issue No.1, question does not survive for the plaintiff to prove that the defendant no.1 is a tenant in arrears of rent for more than six months, and thus, the case of the plaintiff with regard to arrears of rent falling under Sec.12(3)(a) of the Act, the learned Judge of the trial court did not accept the case of the plaintiff. So far as case of the plaintiff with regard to subletting of suit property by the defendant no.1 to the defendant no.2 is concerned, the learned Judge of the trial court has come to a conclusion that the case with regard to subletting is not proved, and therefore, he was pleased to answer Issue No.3 in the negative. As the plaintiff pleaded the case in his plaint that the defendant no.2 has acquired vacant possession of the suitable accommodation for residence in Town Dhoraji, Issue No.4 was framed to the effect as to whether the plaintiff has proved that defendant no.2 has acquired vacant possession of suitable residence, and the learned Judge of the trial court answered that Issue No.4 in the affirmative, meaning thereby he accepted the case of the plaintiff so far as the plaintiff's case falling under Sec. 13(1)(L) of the Act qua the defendant no.2. Therefore, by rendering a judgment Ex.39 on 18th August, 1983 in Regular Civil Suit No. 245 of 1979, the learned Judge of the trial court decreed the suit in favour of the plaintiff ordering the defendants to hand over the possession of the suit property to the plaintiff within four months with a further direction to the defendant no.2 that he should make payment of Rs.380/- being the amount of rent due plus notice charges. The learned Judge of the trial court was also pleased to order the defendant no.2 to pay mesne profits at the rate of Rs.30/- per month for the period from 1st December, 1979 to the date on which he would hand over the possession of the suit property to the plaintiff.

Though, decree was passed against the defendant no.1 i.e. original tenant, he did not file any appeal to the District Court, but being aggrieved against and dissatisfied with the said judgment of the trial court, the defendant no.2 who is alleged to be a sub-tenant of defendant no.1, filed Regular Civil Appeal No. 129 of 1983 in the court of the learned Appellate Judge on 6th September, 1983. In that appeal, the learned Appellate Judge, after hearing arguments of the learned advocates of both the parties and after analysing and appreciating the evidence led by both the parties in the suit before the trial court, he was pleased to come to a conclusion that the plaintiff is entitled to a decree of eviction on

the ground of tenant acquiring vacant possession of a plot for suitable residence, meaning thereby the learned Appellate Judge accepted the case of the plaintiff falling under Sec. 13(1)(l) of the Act qua defendant no.2 only, and therefore, the learned Appellate Judge, by rendering his judgment Ex.13 dated 15th April, 1986 in Regular Civil Appeal No. 129 of 1983, dismissed the appeal with costs filed by the defendant no.2.

5. Being aggrieved against and dissatisfied with that judgment, the original defendant no.2 i.e. appellant of Regular Civil Appeal No. 129 of 1983 has filed this Civil Revision Application challenging correctness, legality, propriety and regularity of the judgment rendered by the learned Appellate Judge.

6. I have heard Shri S.M.Shah, the learned advocate for the respondent petitioner and Shri A.V.Trivedi, the learned advocate for the revision opponent in detail at length. The learned advocates have taken me through the judgment challenged in this Civil Revision Application.

7. Before discussing about the contentions taken by both the parties, it would be necessary to place on record the events which took place during the course of hearing of Regular Civil Appeal No. 129 of 1983 before the learned Appellate Judge.

8. Shri A.V.Trivedi, the learned advocate for the revision opponent, by reading Para 7 of the Judgment submitted that during the course of hearing of the appeal, Mr. A.R.Shukla, the learned advocate for the respondent i.e. landlord in the appellate court submitted a Purshis Ex.12 under the signatures of his client and advocate. That Purshis was taken up as part of the record of the appeal. In that Purshis, it was declared in unambiguous terms to the effect that plaintiff/landlord accepts the findings and considers the defendant no.2 as his direct tenant. That Purshis Ex.12 was brought to the notice of the learned advocate Shri M.H.Parekh who appeared on behalf of the appellant before the Appellate Judge. Mr. Parikh, without putting any kind of endorsement of acceptance or refusal , put an endorsement of only "seen". The learned appellate Judge has observed in Para 7 of his Judgment as follows :-

" Resultant is that the defendant no.2 being a direct tenant of the suit premises so admitted by the plaintiff and his advocate verbally too during the course of arguments of the appeal corroborated by Purshis Ex.12. Consideration of eviction decree on the ground of

sub-tenancy does not survive at all ".

9. Thus, during the course of hearing of appeal, the plaintiff/landlord/respondent accepted the defendant no.2/sub-tenant as his regular tenant, and thereafter, the appeal was heard on the point whether the defendant no.2 has acquired vacant possession of a suitable residence. After hearing the arguments of the learned advocates of both the parties, the learned Appellate Judge was pleased to hold that the plaintiff is entitled to a decree of eviction on the ground of tenant acquiring vacant possession of a plot for suitable residence, and on arriving at that finding, the learned Appellate Judge dismissed the appeal, meaning thereby the decree passed against the defendant no.2 was made confirmed.

10. Shri S.M.Shah, the learned advocate for the revision-petitioner i.e. defendant no.2 has submitted a copy of plaint together with a copy of rent note to this court to consider the contention of the revision-petitioner. Shri S.M.Shah, the learned advocate for the revision petitioner has argued that from the very beginning, it was the case of the plaintiff that the defendant no.1 was his tenant and the defendant no.1 has sublet/assigned the suit premises to the defendant no.2, and thereby, the plaintiff has become entitled to recover the possession of the suit property on the ground falling under Sec.13(1)(l) of the Act. On reading a copy of the plaint, it is crystal clear that there is a cursory statement made in Para 4 of the plaint that the defendant no.2 has acquired the possession of a building in which he can suitably accommodate him with his family members. The plaintiff has not prayed for any decree executable against the defendant no.2 on that ground. Obviously, he cannot ask for a decree for eviction of suit property against defendant no.2 on the ground falling under Sec.13(1)(l) of the Act, because at that time, the defendant no.2 was not a tenant of the plaintiff for the suit premises, and therefore, when the suit was filed, the defendant no.2 was not a tenant of the plaintiff. The plaintiff has categorically stated in his plaint that the suit property was let out to the defendant no.1 under the rent note, and that the defendant no. 1 has sublet the suit property to the defendant no.2. He has further stated that he has not let the suit property to the defendant no.2 and the defendant no.2 was never a tenant of the plaintiff for the suit property, and therefore, till the learned Judge of the trial court delivered the judgment, as per the case of the plaintiff, the defendant no.2 was a trespasser, as the defendant has allowed the defendant no.2 to acquire the possession of the suit

property. Looking to the facts stated in Para 7 of main Judgment of the appellate Judge, for the first time during the course of arguments, the plaintiff by submitting a Purshis Ex.12, accepted the defendant no.2 as his regular tenant. The learned advocate who appeared for the defendant no.2 i.e. appellant before the learned Appellate Judge, put an endorsement of only "seen". He has not accepted the Purshis Ex.12 to be true and correct, and therefore, for the first time, the defendant no.2 became the tenant during the course of arguments of the appeal.

11. Shri S.M.Shah, the learned advocate for the revision-petitioner has argued that looking to the wordings of Sec.13(1)(l) of the Act, the plaintiff is required to prove that tenant has acquired vacant possession of suitable residence. This was not the case of landlord before the trial court, because as per the pleadings made in the plaint, the defendant no.1 was a tenant and not the defendant no.2. As per the case of the plaintiff, he has not given the suit property on lease to the defendant no.2, and that the defendant no.2 was never his tenant, and therefore, cause of action so far as the case concerning Sec.13(1)(l) of the Act, arose for the first time during the course of arguments in the appeal. Shri S.M.Shah, the learned advocate for the revision petitioner has further argued that merely because, the landlord accepted the defendant no.2 as his tenant during pendency of the appeal, case pleaded in the plaint cannot be changed by the plaintiff. Pleadings in the plaint are still in existence, and when there is no case of the plaintiff in the plaint that the defendant no.2 is his tenant, question does not arise for passing a decree of eviction against the defendant no.2 on the basis of that Purshis Ex.12 filed in the proceedings of the appeal. Thus the learned Appellate Judge has committed a serious error of law by confirming the decree of eviction against the defendant no.2. It is recalled that the learned Judge of the trial court did not pass any decree against the defendant no.2 on the ground of subletting, because the Issue No.3 framed at Ex.15 was negatived by him. The learned Judge of the trial court passed a decree against the defendant no.2 on the ground that the defendant no.2 has acquired possession of two blocks situated in Housing Society which is situated on Jamnavad road, Dhoraji. Before the learned Judge of the trial court, the case of the plaintiff was limited only for subletting of the suit property by the defendant no.1 to the defendant no.2 and also for arrears of rent qua defendant no.2. Case of arrears of rent qua defendant no.1 was not accepted. Case of subletting by the

defendant no.1 to the defendant no.2 was also not accepted by the trial court. The trial court only passed a decree of eviction on the ground falling under Sec.13(1)(l) of the Act qua defendant no.2, and therefore, the decree against the defendant no.1 cannot be passed by the trial court. Whatever the case was proved was a case under Sec. 13(1)(l) of the Act so far as it relates to the defendant no.2 only. Under the circumstances, prima facie, the decree passed against the defendant no.1 is not according to law, because whatever the case pleaded by the plaintiff against the defendant no.1 was negatived by the trial court. That decree passed against the defendant no.1 was made absolute by the learned Judge of the Appellate Court. Without assigning any reason, Shri A.V.Trivedi, the learned advocate for the revision opponent defendant no.1 has not preferred any appeal against the decree passed against him, and therefore, that decree is binding to the defendant no.1. When from the record, it appears that the decree passed against the defendant no.1 is not according to law, then this court can also give its finding that the decree qua defendant no.1 is a nullity and is not binding to the defendant no.1. Under the circumstances, tenancy rights created under the rent note which was accepted by the defendant no.1 are still subsisting, and therefore, when the defendant no.1 is still a tenant in the suit property, the decree cannot be passed against the defendant no.1. So far as the decree passed against the defendant no.1 is concerned, from the very beginning, it was not a case of the plaintiff that the defendant no.2 is his tenant. From the very beginning, the plaintiff has denied that the defendant no.2 is a tenant. That question does not arise for making out a case under Sec.13(1)(l) of the Act against the defendant no.2, and therefore, the decree passed against the defendant no.2 on the ground falling under Sec.13(1)(l) of the Act is also a decree not according to law. Under the circumstances, that decree passed by the learned Judge of the trial court which is not according to law and which is confirmed by the Appellate Judge, the judgment of the learned Judge of the appellate court is also not according to law. Under the circumstances, the arguments advanced by Shri S.M.Shah cannot be accepted.

12. At the conclusion of the arguments of Shri A.V.Trivedi, the learned advocate for the revision -opponent has argued that no technical view should be taken and when the decree is passed against the defendant no.2 on the ground falling under Sec. 12(1)(l) of the Act must be confirmed by this court.

13. Shri S.M.Shah, the learned advocate for the revision petitioner has argued that looking to the developments which took place during the course of arguments of this appeal, it was the duty of the plaintiff to first amend the plaint by showing the defendant no.2 as his regular tenant and then should make a specific pleading that case is falling under Sec.13(1)(l) of the Act against the defendant no.2. Thereafter the defendant no.2 would have filed additional written statement in reply to amended plaint and thereafter both the parties would have led evidence on the pleadings of both the parties, as a result, showing the defendant no.2 is his regular tenant in the plaint. Shri S.M.Shah has further argued that merely because 13 years have passed, the decree cannot be confirmed by this court when exfacie it appears that the judgment of the appellate court is not according to law. He has put much emphasis on the pleadings of the plaintiff, more particularly pleadings in the plaint, and he has further argued that it is a rule of law that pleadings governed the parties and no party can travel beyond his pleadings. Under the circumstances, when there is no case of the plaintiff that defendant no.2 was his regular tenant and that the defendant no.2 has acquired vacant possession of the suitable residence, the question does not arise for the trial court as well as the appellate court to pass a decree under Sec.13(1)() of the Act against the defendant no.2 when this court has found that decree passed against the defendant no.1 is nullity.

13. In view of the discussions made hereinbelow, this Civil Revision Application deserves to be allowed and the judgment Ex.13 rendered by the learned Assistant Judge, Rajkot in Regular Civil Appeal No. 129 of 1983 is completely set aside. Consequently, the judgment Ex.39 rendered by the learned Joint Civil Judge, Dhoraji on 18th August, 1983 in Regular Civil Suit No. 245 of 1979 is also set aside. Looking to the facts and circumstances of the case, there shall be no order as to costs. Rule is made absolutely accordingly.

26/07/2000

14. On the next day i.e. on 27th July, 2000 before the aforesaid judgment could be signed, Shri A.V.Trivedi, the learned advocate for the revision opponent no.1 in company of Shri S.M.Shah, the learned advocate for the revision petitioner appeared before this court and requested to consider the judgment which he wanted to cite. In presence of Shri S.M.Shah, Shri A.V.Trivedi,

the learned advocate for the revision opponent has cited one authority in the case of Bank of India Vs. Lekhimoni das and others, reported in (2000) 3 S.S.C. 640, wherein it has been observed by the Hon'ble Supreme Court in Para 11 as follows:-

" Want of pleadings or raising an issue in a suit would arise where any party is put to prejudice. In a case where the facts are read writ large and the parties go to trial on the basis that the claim of the otherside is clearly known to them, we fail to understand as to how lack of pleadings would prejudice them ".

By citing aforesaid authority, Shri A.V.Trivedi has argued that from the very beginning, the plaintiff had advanced his case that the defendant no.2 has obtained a house of his ownership situated in the Town of Dholaji and the defendant no.2 can accommodate his family in the said house. He has further argued that on the basis of that pleadings, the learned Judge of the trial court also framed issues. That issue is at Serial No.4. In Issue No.15 referred to in Para 4 of the plaint, the learned Judge of the trial court has answered Issue No.4 in the affirmative. He has further argued that when both the parties have led evidence on Issue No.4, it cannot be said that the defendant is prejudiced merely because there is no pleading to the effect that the defendant no.2 being a tenant has acquired possession of suitable accommodation, and therefore, as argued by Mr. Trivedi, it cannot be said that the defendant is prejudiced for want of pleadings.

. Shri S.M.Shah, the learned advocate for the revision petitioner has argued that this authority cited by Mr. Trivedi cannot be made applicable to the facts of the present case, because in case on hand, from the very beginning, the plaintiff has come out with the case that the defendant no.1 is a tenant and the defendant no.2 is a trespasser i.e. a subtenant inducted by the defendant no.1. Now the cause of action for brining a case under Sec.13(1)(l) of the Act, the plaintiff has to prove that the tenant is in possession of alternative suitable accommodation for residence. When the defendant no.2 is not a tenant, question does not arise for the court to answer Issue No.4 in the affirmative. Sec.13(1)(l) of the Act will be applicable only to case, if tenant has acquired alternative accommodation suitable for his residence.

As discussed earlier, the learned Judge of the trial court has, by answering Issue No.1, come to a

conclusion that the plaintiff has not proved that the defendant no.2 is his tenant. On failure of the plaintiff for proving the case that the defendant no.1 is a tenant, no inference can be drawn that the defendant no.1 is not a tenant. In the order dictated yesterday i.e. on 26th July, 2000 this court has come to a definite conclusion that the decree passed against the defendant no.1 is a nullity, because case alleged against the defendant no.1 for a case under Sec.12(3)(a) has been negatived and therefore, the decree passed against the defendant no.1 is a nullity and status of the defendant no.1 still exists as a tenant. Now Mr. Trivedi wants to argue before this court that the learned Appellate Judge has rightly passed a decree against the defendant no.2 holding that he is a tenant and case is made out under Sec. 13(1)(l) of the Act. It is again recalled that till the Purshis Ex.12 was submitted in the appellate court, the plaintiff did not accept the defendant no.2 as his tenant. During the course of arguments in appeal, the plaintiff, by submitting a Purshis Ex.12, accepted the defendant no.2 as his tenant and consequently, the learned Judge of the Appellate Judge has passed a decree of eviction against the defendant no.2. When this court has come to a conclusion that status of the defendant no.1 as tenant still subsists, because the decree passed against the defendant no.1 by the learned Judge of the trial court is a nullity, there cannot be two different tenants for one premises, and therefore, when there is no pleading in the plaint, that the defendant no.1 is his tenant, the question does not arise for the trial court to pass a decree under Sec.13(1)(l) of the Act. Sec.13(1)(l) of the Act will be applicable only to a tenant and not to a trespasser. Under the circumstances, the authority cited by Mr. A.V.Trivedi is not applicable to the se of facts and circumstances of this present case on hand, and therefore, the contention taken even on the second day is also not helpful to the revision opponent.

27-07-2000

(H.H.MEHTA,J.)

ccshah